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IN THE

United States

Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

No. 2704.

Edwin R. Crooker, Louise E. Crooker, W. P. Ellis and F. W. Sterling,

Plaintiffs in Error,

vs.

Elizabeth Knudsen,

Defendant in Error.

BRIEF OF PLAINTIFFS IN ERROR.

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STATEMENT OF THE CASE.

This is an action brought by the defendant in error against the plaintiffs in error to recover from the plaintiffs in error the sum of $75,407.52 as damages. Complaint in the action was filed January 26th, 1915, and summons was issued on the 27th day of January, 1915. Defendant in error also prayed that an order of arrest be issued by the District Court against the plaintiffs in

error and each of them under sections 479, 480 and 481 of the Code of Civil Procedure of the state of California. On the 26th day of January, 1915, in accordance with the prayer of the complaint, the Honorable Benjamin F. Bledsoe, judge of the District Court of the United States, Southern District of California, signed an order for the arrest of the plaintiffs in error, requiring the marshal to take the plaintiffs in error into custody and hold them to bail in the sum of $10,000.00 each for Edwin R. Crooker and W. P. Ellis, and $5000.00 each as to Louise E. Crooker and F. W. Sterling. On the 29th day of January, 1915, the marshal took the plaintiff in error Edwin R. Crooker into custody and on the 4th and 8th days of February, respectively, the marshal took into custody the plaintiffs in error Louise E. Crooker and F. W. Sterling, and on the 30th day of January, 1915, the marshal took into custody the plaintiff in error W. P. Ellis. Plaintiffs in error, and each of them, gave bail as required by said order of arrest. Harry L. Crooker, named as defendant in said complaint, was not served with any process and was not before the court.

On the 23rd day of February, by leave of court, the defendant in error filed an amendment to the complaint wherein she recited that she is a citizen of the state of Alabama, one of the states of the United States, changing the first allegation of her complaint wherein she alleged that she was a citizen of the District of Columbia.

On the 13th day of March, 1915, the plaintiffs in error severally and separately moved the court to vacate the order of arrest, which said motions were

made under the provisions of section 503 of the Code of Civil Procedure of the state of California, and which said motions were regularly heard and submitted to the court. Upon argument of counsel and on the 14th day of August, 1915, said motions, and each of them, were by the court denied; no opinion being filed by the Honorable Benjamin F. Bledsoe, to which said ruling the plaintiffs in error each, severally and separately, duly excepted. That thereafter and within the time required by law, the plaintiffs in error sued out a writ of error which was on the 7th day of September, 1915, allowed by the Honorable Benjamin F. Bledsoe. That within the time required by law plaintiffs in error prepared and filed a bill of exceptions in this Honorable Court, which said proceeding is for the purpose of reviewing and having set aside the order of the District Court refusing to vacate the order of arrest.

ASSIGNMENT OF ERRORS.

The plaintiffs in error, and each of them, relied upon the following assignment of errors:

I.

The court erred in denying the motion of the plaintiffs in error, and each of them, to vacate the order of arrest issued in said action, based upon the ground that said court had no jurisdiction to make said order of arrest for the reason that said court had no jurisdiction of the persons of the said plaintiffs in error, or either of them, or of the subject matter of said action. This ruling was erroneous for the reason that at the time said order of arrest was made it affirmatively appeared

from the complaint filed in said action that the defendant in error was a resident and citizen of the city of Washington, District of Columbia, and that the plaintiffs in error Edwin R. Crooker, Louise E. Crooker, F. W. Sterling and W. P. Ellis were residents and citizens of the state of California; and that it affirmatively appeared therefrom that the diversity of citizenship necessary to confer jurisdiction on this court of the persons of plaintiffs in error, or of the subject matter of said action, did not exist, and that the amendment to said complaint filed in said action on the 23rd day of February, 1915, after the arrest of the plaintiffs in error and their release on bail, had no retroactive effect and could not operate to validate said order of arrest made by the court at a time when it affirmatively appeared from the record upon which the court was called to act, that said court was without jurisdiction of the persons of said plaintiffs in error, or the subject matter of said action, and for the further reason that said amendment to said complaint does not allege the diverse citizenship necessary to confer jurisdiction upon said court of the persons of said plaintiffs in error or of the subject matter of said action to have existed at the time of the commencement of said action, and for the further reason that jurisdiction and authority to issue an order of arrest in a civil action is based solely and exclusively, under the laws of the state of California, upon the affidavits filed in support of the application for such order of arrest, and that therefore the court had no right to look beyond said affidavits to the complaint in said action in passing upon the application for said order of arrest.

II.

The court erred in denying the motions of the plaintiffs in error, and each of them, to vacate the order of arrest issued in said action, based upon the ground that the affidavits in said action, upon which said order of arrest was based, are insufficient on their face to justify the court in making said order. This ruling was erroneous for the reason that authority to issue an order of arrest in a civil action is based solely and exclusively upon the affidavits filed in support of the application for such order, and said affidavits contained no allegation whatsoever as to the citizenship of the defendant in error in said action, and do not show the existence of the diversity of citizenship necessary to confer jurisdiction on said court in said action, and for the further reason that said affidavits are made largely and as to many important and essential allegations therein upon information and belief, and that the facts upon which said information and belief was founded are not stated therein, and for the further reason that the facts stated in said affidavits are insufficient to warrant an order for the arrest of said plaintiffs in error, or either of them.

III.

The court erred in denying the motions of the plaintiffs in error, and each of them, to vacate the order of arrest issued in said action, based upon the ground that the complaint in said action is insufficient upon its face to confer jurisdiction upon the court to make said order. This ruling was erroneous for the reason that the complaint in said action at the time of the issuance

of said order of arrest, showed affirmatively upon its face that the diversity of citizenship necessary to confer jurisdiction in said action upon said court did not exist, and for the further reason that it does not appear from said complaint that a cause of action exists against said plaintiffs in error, and for the further reason that the amendment to the complaint filed in said action had no retroactive effect to validate the order of arrest issued at a time when it affirmatively appeared from the record that the court had no jurisdiction of the persons of said plaintiffs in error, or the subject matter of said action, and for the further reason that said amendment to the complaint does not show the diversity of citizenship necessary to confer jurisdiction upon said court to have existed at the commencement of said action, and for the further reason that the jurisdiction and authority of the court to issue an order of arrest in a civil action is based, under the laws of the state of California, solely and exclusively upon the affidavits filed in support of the application for such order of arrest, and that, therefore, the court in passing upon the application for such order of arrest cannot look beyond such affidavits to the complaint, or other proceedings in said action.

IV.

The court erred in denying the motions of the plaintiffs in error, and each of them, to vacate the order of arrest issued in said action, based upon the ground that said order of arrest is void for the reason that at the time said order of arrest was made no summons had been issued in said action. This ruling was er-

roneous for the reason that the laws of the state of California do not authorize the issuance of an order of arrest in a civil action except at the time of the issuance of the summons in said action, or at any time afterwards and before judgment.

ARGUMENT.

The order for the arrest of the plaintiffs in error was made under section 990 of the Revised Statutes of the United States, which reads as follows:

> "No person shall be imprisoned for debt in any state on process issuing from a court of the United States, where, by the laws of such state, imprisonment for debt has been or shall be abolished, and all modifications, conditions and restrictions upon imprisonment for debt provided by the laws of any state shall be applicable to the process issuing from the courts of the United States to be executed therein, and the same course of proceedings shall be adopted therein as may be adopted in the courts of such state."

The statutes of the state of California, under the head of "Provisional Remedies in Civil Actions," are as follows:

Section 478 of the Code of Civil Procedure:

> "No person can be arrested in a civil action except as prescribed in this code."

Section 479 of the Code of Civil Procedure:

> "The defendant may be arrested as herein prescribed in the following cases:
>
> "(1) In an action for the recovery of money, or damages, on a cause of action arising upon con-

tract, express or implied, when the defendant is about to depart from the state with intent to defraud his creditors.

"(2) In an action for a fine or penalty, or for money or property embezzled, or fraudulently misapplied, or converted to his own use, by a public officer, or an officer of a corporation, or an attorney, factor, broker, agent or clerk, in the course of his employment as such, or by any other person in a fiduciary capacity; or for misconduct or neglect in office, or in a professional employment, or for a wilful violation of duty.

"(3) In an action to recover the possession of personal property unjustly detained, when the property or any part thereof has been concealed, removed or disposed of, to prevent its being found or taken by the sheriff.

"(4) When the defendant has been guilty of a fraud in contracting the debt or incurring the obligation for which the action is brought; or in concealing or disposing of the property for the taking, detention or conversion of which the action is brought.

"(5) When the defendant has removed or disposed of his property, or is about to do so, with intent to defraud his creditors."

Section 481 of the Code of Civil Procedure:

"The order may be made whenever it appears to the judge, by the affidavit of the plaintiff, or some other person, that a sufficient cause of action exists, and that the case is one of those mentioned in section four hundred and seventy-nine. The affidavit must be either positive or upon information and belief; and when upon information and belief, it must state the facts upon which the information and belief are founded. If an order of

arrest be made, the affidavit must be filed with the clerk of the court."

Section 483 of the Code of Civil Procedure:

"The order may be made at the time of the issuing of the summons, or any time afterwards before judgment. It must require the sheriff of the county where the defendant may be found forthwith to arrest him and hold him to bail in a specified sum, and to return the order at a time therein mentioned, to the clerk of the court in which the action is pending."

Section 503 of the Code of Civil Procedure:

"A defendant arrested may, at any time before the trial of the action, or if there be no trial, before the entry of judgment, apply to the judge who made the order, or the court in which the action is pending, upon reasonable notice, to vacate the order of arrest or to reduce the amount of bail. If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made."

The District Court of the United States, Southern District of California, took jurisdiction of this proceeding by reason of section 990 of the Revised Statutes of the United States and the statutes of California above quoted, and if said statutes did not exist, the District Court would not have had jurisdiction to order the plaintiffs in error into custody, and by section 990 of the Revised Statutes of the United States the same course of proceeding as existed in the state court is adopted by the courts of the United States.

A Proceeding for Arrest in a Civil Action is a Special Proceeding in the State of California, and the Statute Must be Strictly Construed.

Section 22 of the Code of Civil Procedure of the state of California provides:

> "An action is an ordinary proceeling in a court of justice by which one party prosecutes another for the enforcement or protection of a right, the redress or prevention of a wrong or the punishment of a public offense."

Section 23, C. C. P., provides:

> "Every other remedy is a special proceeding."

The law in California is well settled that in special proceedings, which are only such as are authorized by the statute, the statute must be strictly construed, and that all doubt must be resolved in favor of the person against whom the proceeding is instituted.

In Smith v. Westerfield, 88 Cal. 374, at 379, the court says:

> "Jurisdiction of special proceedings is conferred by the Constitution upon the Superior Court, but inasmuch as special proceedings are only such as are created and authorized by statute, the court, in the exercise of its jurisdiction, is limited by the terms and conditions under which the proceedings were authorized."

In Fkumoto v. Marsh, which was a case involving an order of arrest in a civil action, 130 Cal. 66, at 70, the court says:

> "We think an affidavit resting wholly, or in any one essential particular, on information and belief,

without stating facts upon which such belief is founded, does not confer jurisdiction to issue the order. The statute must be complied with or there is no jurisdiction to issue the order. *In re* Vinich, 86 Cal. 70, 7 Am. & Eng. Ency. of Law, First Ed., 682, and cases cited.

"It was said in Spice v. Steinrick, 14 Ohio St. 213: 'It is clear, we think, that in the exercise of this special and extraordinary power conferred by the statute and interfering with the personal liberty of the defendant, *the course prescribed by the statute* must be strictly pursued.'" (The italics are ours.)

In the case of Hathaway v. Johnson, 39 N. Y. 93, 14 Am. Rep. 186, the court says:

"Statutes authorizing arrest and imprisonment for debt, although remedial in that they are designed to coerce, by reason of imprisonment, the payment of the creditor, are also regarded as penal, and ought not to be extended by construction so as to embrace cases not clearly within them."

In 3 Cyc., page 899, on the subject of "Arrest," we find the following language:

"Statutes authorizing the arrest and holding to bail of defendants in certain civil actions do not violate constitutional provisions forbidding deprivation of liberty without due process of law, the imposition of cruel and unusual punishment, or imprisonment for debt. Such statutes should, however, be strictly construed."

In the case of Irvine v. McKeon, 23 Cal. 472, which is a case involving the construction of a statute mak-

ing the directors of a corporation personally liable for the debts of the company in excess of its capital stock actually paid in, the court, at page 475, says:

> "This statute provides for making one person individually liable for the debts of another, and prescribes how and under what circumstances he shall be held thus liable. Like other statutes which create a forfeiture or impose a penalty, it is to be strictly construed, and every intendment and presumption is in favor of the defendant in such cases. He is to be held liable only on full and strict proof of all the facts by the statute made essential to create the liability."

We also cite to the same effect the following cases:

Trumpler v. Bemerly, 39 Cal. 490;
Ex parte Kohler, 74 Cal. 38.

The foregoing being the law governing the construction of statutes affecting the property of a defendant, which are penal in their nature, it follows that the rule is more forcible requiring the strict construction of statutes which involve the personal liberty of the defendant.

As was said by the court in *ex parte* Fkumoto, 120 Cal. 316, at 321, which was a case of arrest in a civil action:

> "If this is so in cases not involving the liberty of a citizen, a *fortiori* is demanded in a proceeding such as this."

The Statute has not been Strictly Complied With and Hence the Proceeding is Void.

That statute has not been complied with.

First: For the reason that the affidavit which gives the court jurisdiction to issue the order of arrest does not show that a sufficient cause of action exists.

Second: For the reason that the affidavits are made upon information and belief and no facts are stated upon which the information and belief are founded. (Section 481 of Code of Civil Procedure of the state of California, above quoted.)

Third: The order of arrest was made prior to the issuance of summons in the said action, directly in violation of section 483 of the Code of Civil Procedure of the state of California, above quoted.

Affidavit Does Not Show That Cause of Action Exists.

The affidavit under which the order in this case was made does not show that a cause of action exists against the plaintiffs in error. The only reference to any cause of action pending or existing against the plaintiffs in error is the conclusion of the defendant in error at the beginning of the affidavit, "That she is the plaintiff above named." [Tr. p. 69, fol. 65.]

In the case of McGilvery v. Morehead, 2 Cal. 607, at 609, the court says:

> "The act which allows a party to be arrested in a civil case requires the affidavit to disclose that a sufficient cause of action exists, and that the case is one of those for which the remedy of arrest is provided.

"It is well settled that the facts necessary to be shown, must appear by the positive averments of the affidavit, and it is insufficient to refer to the complaint or to any other paper to show what the affidavit ought itself to disclose, although it is positively averred that such complaint or paper is true."

In Fkumoto v. Marsh, 130 Cal. 66, at 69, the court says:

"As the jurisdiction to issue the warrant rests upon the affidavit, it results, from what has been said, that the order of arrest was void, and the warrant is no authority for the prisoner's detention. Respondent seems to be of the impression that jurisdiction is aided by the pendency of the action. It is necessary to the jurisdiction that an action be pending (Code of Civil Procedure, 480, 483), but as above stated, jurisdiction to make the order rests upon the affidavit."

Again, at page 70, the court says:

"Where the judge has, in fact, no jurisdiction to act, his order of arrest is void, and whether he has jurisdiction must be determined from the affidavit itself, and not from what the judge thinks it authorizes him to do. The plaintiff must see to it that he is clothed with actual, not merely apparent, authority before he can deprive the defendant of his liberty."

In Peterson v. Nesbitt, 11 Cal. App. 370, at 373, the court says:

"Jurisdiction to issue an order of arrest in a civil suit rests upon the affidavit. Where the affidavit in an essential particular fails to meet the

requirements of the law, the court is without jurisdiction to issue the order for arrest. (Citing *ex parte* Fkumoto, 120 Cal. 326, 52 Pac. 726; Neves v. Kosca, 5 Cal. App. 111, 89 Pac. 860.)"

Citing also the case of:

Lay v. Superior Court, 11 Cal. App. 558, and Farrow v. Dutcher, 19 R. I. 715.

Hence, it will be observed that unless the affidavit shows that a cause of action existed against the plaintiffs in error, the order of arrest was made without authority and was void. The affidavit has no averment that the defendant in error has a cause of action against the plaintiffs in error, and taking the facts set out in the affidavit, it is insufficient to constitute a cause of action against the plaintiffs in error, or either of them. The affidavit is merely a series of conclusions of the affiant and hence does not show from the facts stated that a cause of action exists against the plaintiffs in error, or either of them, nor does said affidavit show that the judge who issued the order was the judge of the court in which the action is pending, or that any action was pending in any court.

Section 480 of the Code of Civil Procedure reads as follows:

"An order for the arrest of the defendant must be obtained from the judge of the court in which the action is brought."

Hence, the affidavit is defective in not showing that a sufficient cause of action exists and that there is an action pending before the court of which the judge who signed the order was judge.

Affidavits are Insufficient for the Reason that they are Made upon Information and Belief.

Under section 481 of the Code of Civil Procedure of the state of California, above quoted, the affidavits for arrest in civil actions, if made upon information and belief, must state the facts upon which the information and belief are founded, and such affidavit must bring the action within one of the provisions mentioned in section 479, C. C. P., above quoted.

We submit that the affidavits in this case are wholly insufficient because made upon information and belief and no facts are stated upon which the information and belief are founded, and that the showing of the affidavit does not bring the case within one of the provisions of section 479, C. C. P., above quoted.

If said action is within section 479, C. C. P., at all, it must either come within subdivisions 1, 4 or 5, and could not possibly come under subdivisions 2 or 3 of said section.

The Affidavit is Insufficient to bring the Case under Sub-Division I of Section 479 of the Code of Civil Procedure.

The affidavit of the plaintiff, defendant in error here, shows that the defendants, plaintiffs in error here, are about to leave the state with intent to defraud creditors of Domestic Utilities Mfg. Co.; such allegation should be that the defendants below, plaintiffs in error here, were about to depart from the state with intent to defraud their creditors. The above allegation was made upon information and belief and the facts upon which she founds her information and belief are as

follows: That defendant E. R. Crooker has repeatedly stated within the past 60 days to persons in the city of Los Angeles, without naming them, that he intended to go to England to remain indefinitely; that she is informed by persons whom she believes to be reliable that defendant Edwin R. Crooker is hiding in the vicinity of Los Angeles; that defendants are preparing for immediate departure from the United States by steamer for Australia, with the intention of remaining permanently out of the United States, and that if they are not prevented from sailing she will lose all chance of securing redress.

This is made upon information and belief. The defendant also states that her information was gotten from a man who called her on the phone and told her that he would not give her his name or consent to the use of his name, but that she believed she knew who the person was who was speaking to her, but that she does not desire to disclose his name. That she had a conversation with a business man in the City of Los Angeles who has done business with the Domestic Utilities Manufacturing Company, who would not give her any information until she promised not to use his name. The affidavit does not disclose his name, nor does said man make any affidavit. That she has tried to get service on the defendants Edwin R. Crooker and Harry L. Crooker in December, 1913, in New York and Washington, D. C., and that she employed attorneys to prepare a suit against the Crookers in Washington, D. C.

There is no allegation in the affidavit, except the ones referred to above, with reference to the defendant

in error's information about the plaintiffs in error leaving the state. The court will note that such allegations as are stated are mere hearsay and cannot be construed as a statement of fact.

In the case of *ex parte* Fkumoto, 120 Cal. 316, at 319, the court says:

> "It is quite apparent that these facts do not bring the case within either of the provisions of the statute relied on by respondent. Very clearly do they fall short of showing that 'defendant is about to depart from the state, with intent to defraud his creditors.' No such purpose or intent is expressly asserted, nor are facts stated from which such deduction may be made. 'That defendant will escape from the state' and thus 'defraud and cheat this plaintiff' is not the equivalent of the statutory requirements that he 'is about to depart from the state with intent to defraud his creditors.' Both the present purpose and the specific intent found in the language of the statute are wanting in that of the affidavit. When the language of such a statute is departed from, the party must, at his peril, employ words of equivalent import, and a failure in this respect is fatal. (Drake on Attachment, section 8; Jackson v. Burke, 4 Heisk 610.) Moreover, the statement that defendant 'will escape from the state,' etc., is the mere statement of the conclusion or belief of the affiant, and without a statement of the facts from which such conclusion is drawn or upon which the belief is founded is not evidence upon which the court is at liberty to act in such a case. (Burrichter v. Cline, 3 Wash. 135; Thompson v. Best, 21 N. Y. St. Rep. 105; 4 N. Y. Supp. 229.) 'Where in a civil action the plaintiff desires, so to speak, to enforce his claim

at the outset by arrest and imprisonment of the defendant; in other words, to have execution before obtaining judgment, it is not too much to ask him to present such evidence as alone would be receivable upon the trial of the action to justify an ordinary judgment for money.' (Markey v. Diamond, 20 N. Y. Supp. 847, 1 Misc. Rep. 97.) * * * These and like statements, which need not be specifically referred to, are, as suggested above, too vague, general and indefinite from which to deduce that specific intent of fraudulent purpose which is the basic element upon which the right given by the statute rests, and which must be made clearly to appear before the remedy may be invoked. *It is not enough to assert such fraudulent intent in general terms.* Like the statement or proof of a cause of action for fraud, *the specific facts relied on must be shown,* that the court itself may deduce the fraud, and not leave the question of the sufficiency of his facts to be passed upon by the party. (Morris v. Talcott, 96 N. Y. 107.) If this is so in cases not involving the liberty of the citizen, *a fortiori* it is demanded in a proceeding such as this; otherwise, the party is constituted the arbiter of his own rights.

"There is another fatal defect common to the entire affidavit. Several of the statements of fact are made expressly upon information and belief, while many others, *although not so stated in terms, are of a character which could, in their nature, only have been so made,* whereas the facts upon which such information and belief are founded are in no instance given. In this the affidavit fails to comply with one of the express and most material requirements of the statute (Code of Civil Procedure, Sec. 481).

"As the jurisdiction to issue the warrant rests upon the affidavit, it results, from what has been said, that the order of arrest was void and the warrant is no authority for petitioner's detention." (The italics are ours.)

In Fkumoto v. Marsh, 130 Cal. 66, at 69 and 70, the court says:

"But the statute expressly requires that when the affidavit is upon information and belief 'it must state the facts upon which the information and belief are founded.' We cannot agree with respondent that it is but error to be corrected on appeal where facts are stated as was done in the affidavit before us. We think an affidavit resting wholly, *or in any one essential particular,* on information and belief, without stating the facts upon which such belief is founded, does not confer jurisdiction to issue the order. The statute must be complied with or there is no jurisdiction to issue the order. *(In re* Vinich, 86 Cal. 70, 7 Am. & Eng. Enc. of Law, First Ed. 682, and cases cited.) It was said in Spice v. Steinruck, 14 Ohio St. 213: 'It is clear. we think, that in the exercise of this special and extraordinary power conferred by the statute and interfering with the personal liberty of defendant, the course prescribed by the statute must be strictly pursued.'" (The italics are ours.)

In Neves v. Costa, 5 Cal. App. 111, at 115, the court says:

"The affidavit must be either positive or upon information and belief, and when upon information and belief, it must *state the facts* upon which the information and belief are founded.

"In order that it may appear to the judge, it is necessary that the facts shall be stated by competent evidence, such as would justify the court in making a finding upon a trial. * * *

"While the affidavit may state generally the grounds of the application upon belief only, we understand the rule to be well settled that to show the grounds of his belief he must set forth such facts and circumstances *within his own knowledge* as will authorize the officer who is to issue the warrant to find such a state of facts as required by the statute to authorize the proceeding, and if the plaintiff is not himself personally cognizant of the facts and circumstances relied upon, he must procure the affidavit of someone who is thus personally cognizant of them. The warrant cannot be issued upon hearsay, nor upon any statement, however positive, founded upon hearsay. (Proctor v. Prout, 17 Mich. 475.)

"The affidavit contains no positive allegation of fraudulent intent, and the only statement of the debtor's intention to leave the state is that he told M. Macedo so. The latter statement is positive in form only. It is hearsay, pure and simple. * * *

"The affidavit seems wanting in the elements necessary to confer jurisdiction. There is neither positive averment of fraud nor positive evidence of facts from which fraud can be inferred. (Fkumoto v. Marsh, 130 Cal. 68.)" (The italics are ours.)

Therefore, it is clear to our minds that any allegation of the affidavit that "defendants are about to depart from the state with intent to defraud the creditors of the Domestic Utilities Manufacturing Co." are mere conclusions and hearsay and do not measure up to the requirements of the statute. We also call the court's

attention to the fact that the allegations of the affidavit are that the "defendants are about to leave the state for the purpose of defrauding the creditors of the Domestic Utilities Mfg. Co.," which does not come within the statute, which provides that "the affidavit must show that he is about to depart from the state with intent to defraud *his* creditors," and putting a strict construction on the statute, as we have heretofore seen should be done, the affidavit is wholly insufficient for the reason that it does not show that the plaintiffs in error were about to depart from the state for the purpose of defrauding *their* creditors.

The affidavit does not bring the case under subdivision 4 of section 479 of Code of Civil Procedure, above quoted, for the reason that the affidavit does not show that the defendant, plaintiffs in error here, were guilty of fraud in contracting the debt or incurring the obligation for which the action is brought. We have seen that allegations in an affidavit, if made upon information and belief, must state the facts upon which the information and belief are founded. The general allegations that the plaintiffs in error were guilty of fraud are not sufficient. There is no fact set out in the affidavit, but the affidavit merely contains conclusion of the affiant that the plaintiffs in error were guilty of fraud in contracting the debt and could not be considered by the court as positive allegations of fact. The affidavits show that certain circulars were distributed and that the defendant saw said circulars and read them, but do not set out what the circulars contained, and the court could not determine whether there was any misrepresentation or fraudulent matter in said cir-

culars or not; hence such allegations are mere conclusions of the affiant. The affidavit also contains an allegation that the plaintiffs in error conspired to cheat and swindle the defendant by means of said circulars and contract, without specifying any misrepresentations or fraudulent pretenses relied upon by the affiant. There are also many allegations in the affidavit showing that the plaintiffs in error, after the entering into said agreements with the defendant in error, failed to carry out their agreements with her, but such failure on the part of the plaintiffs in error were not fraudulent and were not representations upon which she relied when she entered into the contract, they are mere breaches of contract for failure to deliver washers purchased by her. From a careful reading of the affidavit the court will see that there is no allegation of fraud that would come within subdivision 4 of section 479 of the Code of Civil Procedure, namely: fraud in contracting the debt and incurring the obligation.

In this regard we cite the court in the case of Thorpe v. Waddingham, 3 Dalys (N. Y.) 275:

> "It is well settled in practice that where fraud is alleged as the basis of an arrest, the particular facts constituting the fraud should be set forth, to enable the court to pass judicially upon the question. A general allegation that a party has been guilty of fraud is the statement of a conclusion, which may or may not be correct.
>
> "In the case of fraudulent representations by which a party is subject to arrest it must appear not only that the same were false, but that they were known to be such at the time they were made."

In Draper v. Beers, 17 Abb. Pr. (N. Y.) 163, the court says:

> "The affidavit to authorize an order of arrest for fraudulent representations, whereby the defendant procured the sale and delivery of personal property, must not only set forth the particular statements or representations made in order to obtain the property, but must also set forth in what respects they are false. A general allegation that the representations made are false and fraudulent is not sufficient."

If we view the affidavit in this case in the light of the foregoing opinions it will readily be seen that they are insufficient to authorize the order of arrest. An arrest is only authorized by section 479 of the Code of Civil Procedure of the state of California and not otherwise.

The affidavits do not bring the case within subdivision 5 of section 479 of the Code of Civil Procedure, namely: that the defendant is about to remove or dispose of his property with intent to defraud *his* creditors. The affidavit contains no allegations of any fact showing that the plaintiffs in error, or either of them, were about to remove their property to defraud their creditors; such allegations, whatever they are, are made upon information and belief of the affiant and are wholly insufficient to justify the issuance of an order upon this ground.

In the case of Moller v. Azuar, 11 Abb. Pr. (N. S.) 233, which was a case in which an order of arrest had been issued upon this ground, the court says:

> "There is no specification of any such property, and the general allegation of the plaintiff's belief of defendant's intent to remove or dispose of any such property, without pointing to the specific property or circumstances upon which such belief was predicated, is clearly insufficient to uphold an order of arrest. The fact of his having so removed or disposed of his property or of his intent so to do must be presented by some evidence tending to that conclusion. It is not sufficient to sustain the order of arrest that plaintiff have some vague belief of such fact."

So, in the case at bar, the most that can be said from the affidavits is that the defendant in error has some vague belief that the plaintiffs in error have at some time had some property, and that she thinks they have secreted it, but the allegations are so vague and indefinite as to be clearly insufficient to sustain an order of arrest. There is no allegation that any attempt has ever been made to find any property belonging to the defendant, the only allegation being that search has been made among the public records of Los Angeles, California.

Order of Arrest was Irregularly and Prematurely Issued and is Therefore Void.

Under section 483 of the Code of Civil Procedure of the state of California, above quoted, an order of arrest can only be made at the time of the issuance of summons, or at any time *afterwards* before judgment. The record in this case shows that the summons was issued one day after the issuance of the order of arrest.

The defendant in error, if she pursues the drastic

remedy of arresting the plaintiffs in error must, at her peril, strictly follow the statute. (See cases above cited.)

The Record upon its Face, upon which the Court Acted When it Issued the Order of Arrest, Showed Affirmatively that the Court had no Jurisdiction of the Parties or Subject Matters.

We have contended heretofore in this brief, and cited cases to that effect, that the court can only look to the affidavit in making an order of arrest under the statutes of the state of California, but the court, upon hearing this motion, assumed and ruled that he had the right to look to the complaint, and, therefore, without conceding the fact that he had such a right, we will argue the sufficiency of the record, considering the affidavit and the complaint, at the time of the making of the order of arrest.

The complaint on its face showed that the court was without any jurisdiction of the parties or the subject matter, for the reason that it affirmatively appeared from the complaint that the plaintiff therein, defendant in error here, was a citizen of the District of Columbia. It will not be necessary to cite numerous authorities to show that this allegation was insufficient to confer jurisdiction upon the court, and we will content ourselves with citing two cases as this contention is virtually conceded by the defendant in error.

The cases upon this point are:

Hooey v. Jamieson, 166 U. S. 398;
Hepburn v. Ellzey, 2 Cranch. 445.

Defendant in error contended at the hearing of said motion, and the court so held, that the court could, upon this motion, look to the amendment to the complaint to sustain its jurisdiction to make the order. The order in this case, as was shown in the statement of fact, was made on the 26th day of January, 1915, and the amendment to the complaint was filed on the 23rd day of February, 1915, nearly a month after the order of arrest was made and after the arrest and admission to bail of all of plaintiffs in error. Unfortunately for the plaintiffs' contention, the law as laid down and repeatedly stated by the Supreme Court of the United States is that the federal courts are courts of limited jurisdiction and there is no presumption in favor of their jurisdiction, but the presumption is that they have no jurisdiction, and that facts conferring jurisdiction *must affirmatively appear from the record upon which the court is called to act.*

The case of Mansfield C. & L. M. Railway Co. v. Swan, 111 U. S. 379, is one of the leading cases upon this subject, and the court in that case, at pages 381, 382 and 383 of the opinion, uses the following language:

> "It appears from the petition for removal, and not otherwise by the record elsewhere, that at the time the action was first brought in the state court one of the plaintiffs and a necessary party, McMann, was a citizen of Ohio, the same state of which the defendants were citizens. It does not *affirmatively* appear that at the time of the removal he was a citizen of any other state. The averment is that he was not then a citizen of Ohio, and that his actual citizenship was unknown, except that

he was a citizen of one of the states or territories. It is consistent with this statement, that he was not a citizen of any state. He may have been a citizen of a territory, and if so, the requisite citizenship would not exist. (New Orleans v. Winner, 1 Wheat. 91.)

"According to the decision in Gibson v. Bruce, 108 U. S. 561, the difference of citizenship on which the right of removal depends must have existed at the time when the suit was begun, as well as at the time of the removal, and according to the uniform decisions of this court, the jurisdiction of the Circuit Court fails unless the necessary citizenship affirmatively appears from the pleadings or elsewhere in the record. Grace v. American Central Ins. Co., 109 U. S. 278, 283; Robertson v. Cease, 97 U. S. 646.

"It was error, therefore, in the Circuit Court to assume jurisdiction in the case, and not to remand it on the motion of the plaintiffs below.

"It is true that the plaintiffs below, against whose objection the error was committed, do not complain of being prejudiced by it, and it seems to be an anomaly and a hardship that the party at whose instance it was committed should be permitted to derive an advantage from it, but the rule springing from the nature and limits of the judicial power of the United States *is inflexible and without exception* which requires this court, of its own motion, to deny its own jurisdiction and, in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not *affirmatively appear in the record on which, in the exercise of that power, it is called to act.* * * * And in the most recent utterance of this court upon the point, in Bors v. Preston, *ante* 252, it was said by

Mr. Justice Harlan: 'In cases of which the Circuit Court may take cognizance only by reason of the citizenship of the parties, this court, as its decisions indicate, has, except under special circumstances, declined to express any opinion upon the merits on appeal or writ of error, where the record does not affirmatively show jurisdiction in the court below. This because the courts of the Union, being courts of limited jurisdiction, *the presumption in every stage of the cause is that it is without their jurisdiction unless the contrary appears from the record.*'

"The reason of the rule and the necessity of its application are stronger and more obvious when, as in the present case, the failure of the jurisdiction of the Circuit Court arises, not merely because the record omits the averment necessary to its existence, *but because it recites facts which contradict it.*" (The italics are ours.)

So, in the case at bar, the record upon which the court was called to act and upon which it did act in issuing the order of arrest shows affirmatively, upon its face, that the courts of the United States were without jurisdiction in the case, for at that time the affirmative allegation in the complaint was that the plaintiff was a citizen of the District of Columbia.

See also Bors v. Preston, 111 U. S. 252, quoted in the above opinion.

In the case of Drake v. American Central Ins. Co., 109 U. S. 278, at 283, the court says:

"The record in this case presents a question of jurisdiction which, although not raised by either party in the court below or in this court, we do

not feel at liberty to pass without notice. Sullivan v. Fulton Steamboat Co., 6 Wheat. 450; Jackson v. Ashton, 8 Pet. 148. As the jurisdiction of the Circuit Court is limited in the sense that it has no other jurisdiction than that conferred by the Constitution and laws of the United States, *the presumption is that a cause is without its jurisdiction unless the contrary affirmatively appear.* Turner v. Bank of North America, 4 Dall. 8; *Ex parte* Smith, 94 U. S. 455; Roberts v. Cease, 97 U. S. 646." (The italics are ours.)

Again in the case of King Vridge Co. v. Otoe County, 120 U. S. 225, the court says:

"This case was argued upon the question of limitation, but we have no occasion to consider that question, for it does not appear that the Circuit Court had jurisdiction in the action. Unless the contrary appears *affirmatively* from the record, the presumption upon writ of error or appeal *is that the court below was without jurisdiction.* (Citing cases.)

"That the point as to jurisdiction was not made here by either party is immaterial because, as said in Mansfield etc. Railway Co. v. Swan, 112 U. S. 379, at 382, 'The rule springing from the nature and limits of the judicial power of the United States is inflexible and without exception which requires this court, of its own motion, to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases where such jurisdiction does not *affirmatively appear in the record on which, in the exercise of that power, it is called to act.*'" (The italics are ours.)

In Parker v. Ormsby, 141 U. S. 81, at 83, the court says:

> "Did the court below have jurisdiction of this case? If jurisdiction did not affirmatively appear upon the record it was error to have rendered a decree, whether the question of jurisdiction was raised or not in the court below. In the exercise of its power this court, of its own motion, must deny the jurisdiction of the courts of the United States in all cases coming before it, upon writ of error or appeal, *where such jurisdiction does not affirmatively appear in the record on which it is called to act.*"

Many other cases might be cited to the effect that the jurisdiction of the courts of the United States must affirmatively appear in the record on which the court is called to act.

The Court could not Look to the Amendment to the Complaint in Aid of its Jurisdiction upon the Hearing of the Motion to Vacate the Order of Arrest.

The Code of Civil Procedure, section 503, one of the sections dealing with these proceedings, provides:

> "* * * If the application be made upon affidavits on the part of the defendant, but not otherwise, the plaintiff may oppose the same by affidavits or other proofs, in addition to those on which the order of arrest was made."

In this case the application is not made upon affidavits on behalf of the plaintiffs in error and therefore under the express provision of the code governing the application to vacate the order of arrest, the defendant in error is not to be allowed to oppose the motion of

plaintiffs in error with any documents whatsoever other than those on which the order of arrest was made. Clearly, the wording of this section is so broad and comprehensive as to eliminate any question of the right of the defendant in error to rely upon an amendment to her complaint to support the order of arrest.

The question of the right of the defendant in error to amend the papers upon which the order of arrest is based, in proceedings of this character, has also been directly passed upon in Rhode Island and New York, both of which states have statutes governing this proceeding practically the same as the statutes of California.

In So. Navigation Co. v. Sherwin, 1 N. Y. Civ. Proc. Rep. 44, it was said:

> "The order of arrest in this case was granted, as appears by the recitals in the order, upon the summons and complaint and the affidavits of William K. Gleason and William B. Hornblower. Section 558 of the Code of Civil Procedure, as amended in 1879, provides:
>
> " 'But at any time after the filing or service of the complaint the order of arrest must be vacated, on motion, if the complaint fails to set forth a sufficient cause of action, as required by the last section,' i. e., section 557. The complaint which was served upon the defendant, with the summons and affidavits, fails to set forth any cause of action whatever in favor of the plaintiff, against the defendant. It, therefore, follows that this motion must be granted, unless the amended complaint, which has been served on the part of the plaintiff, can be resorted to uphold the order of arrest, by granting the plaintiff's motion that such

complaint be declared amended *nunc pro tunc,* as of the date of the service of the original complaint. (See Hecht v. Levy, 20 Hun. 53; Easton v. Cassidy, 21 Id. 460.)

"I am of the opinion that the motion of the plaintiff should not be granted, for the purpose of upholding the order of arrest. The issuing of an order of arrest is not a matter of course, and it is the duty of the plaintiff who invokes the aid of the court in obtaining such an order to see that he has complied with all the requirements of the law applicable thereto. In the case of Donnell v. Williams, 21 Hun. 216, it was held that the failure to state in an affidavit upon which an application for attachment is made that the plaintiff is entitled to recover the sum mentioned therein, over and above all counter-claims known to him, as required by section 636 of the code, renders the attachment void *ab initio,* and in Blossom v. Estes, 22 Hun. 472, the court, at general term, say: 'It has been repeatedly held that an attachment is invalidated by the failure to serve or publish the summons within thirty days after the issuing of the warrant. The court may, of course, acquire jurisdiction and proceed with the action, *in personam,* upon the service of a summons or the defendant's voluntary appearance of a later date. But the provisional remedy fails unless the service is effected or the publication commenced within the time prescribed by statute. * * * This was not a mere irregularity, but a jurisdictional omission, which invoked the destruction of the warrant.'

"'The reason in these cases seems to me to apply with peculiar force to this case. The liberty of the citizen is of quite as much importance as the preservation or security of his property. If the

provisions of the code are to be strictly construed in cases of attachment, the same rule of construction should be applied to the provisions which relate to the obtaining of orders of arrest.

"Again, this motion is made under section 568, on the plaintiff's own papers, and must be heard, as that section declares, upon those papers only. To allow the plaintiff to introduce an amended complaint on this motion would be allowing him to refer to other papers than those on which the order was granted, and in violation of that section."

So in the case at bar, as above stated, we are making this motion under section 503, upon the papers on which the order of arrest was made, and under that section and under the above case, no other papers can be considered. Certainly, in this action the plaintiff is no more entitled to have an amendment to his complaint considered, which seeks to correct an admittedly fatal jurisdictional allegation in the original complaint, than the plaintiff in the New York case was to amend his complaint so that it would state a cause of action. Especially is this rule applicable to cases in the United States courts, in which courts, as shown by the cases heretofore cited, there is no presumption in favor of their jurisdiction, but, on the contrary, the presumption is that the court is without jurisdiction until the contrary affirmatively appears from the *record upon which the court is called to act.*

In the case of Farrow v. Dutcher, 19 R. I. 715, at 716, which was also a case involving the validity of an order of arrest in a civil action, the court says:

"We are of the opinion that the District Court of the Fourth Judicial District erred in permitting the affidavit on the back of the writ, which is a condition precedent to the service of the writ by arrest, to be amended by the insertion of the words, after the word 'claim,' 'that is due.' The plaintiffs contend that the insertion of these words did not materially alter the meaning of the affidavit, but that they were implied in the statement that the plaintiff has 'a claim on which he expects to recover in the action.' We do not assent to this argument. The framers of the statute, for good reason, no doubt, saw fit to require, in addition to the other statements, the statement that the claim is due, and we see no reason for dispensing with the allegation. As the affidavit is the foundation on which the right to arrest is based, it must be strictly complied with, or the arrest is unlawful. Spice v. Steinruck, 14 Ohio St. 213, 219; Whiting v. Trafton, 16 Me. 398; Probate Court of Hopkinton v. Lanthear, 14 R. I. 291."

The foregoing authorities seem to dispose conclusively of plaintiff's contention that the amendment to the complaint can be considered on this motion, and as admittedly the complaint in this action, at the time the order of arrest was made, showed affirmatively on its face that the court was without jurisdiction, it follows that the order of arrest is void and must be vacated.

Furthermore, the amendment to the complaint, even though it could be considered on this motion, which, as above shown, cannot be done, is insufficient to confer jurisdiction upon the court in this action. The allegation in the amendment to the complaint is that the

plaintiff "is a citizen of the state of Alabama." [Tr. p. 142, fol. 131.] The amendment was sworn to on the 23rd day of February, 1915. Counsel, in his argument at the time of the hearing of this motion, says that this carries the allegation back to the commencement of the action and is equivalent to an allegation that the plaintiff was at the commencement of the action, on the 26th day of January, 1915, a citizen of the state of Alabama, and cites a case in 5 Blatchford 251, in support of his position. A careful reading of this case, however, shows that it does not support his contention. That was a case in which the trial was had upon an amended declaration, and there is nothing to show that there was any conflict upon the jurisdictional averment of citizenship between the amended declaration and the original declaration in the action. In the case at bar, however, the original complaint affirmatively alleges citizenship in the District of Columbia, which would not confer jurisdiction upon this court. A month later the plaintiff swears to and files an amendment to her complaint, alleging that she is at that time a citizen of Alabama. This does not overcome the defective allegation in the original complaint and does not confer jurisdiction upon this court. It may well be that on February 23rd the plaintiff was a citizen of Alabama, and yet she may also, on January 26th, have been a citizen of the District of Columbia, and in fact, the pleadings, as they now stand, raise a presumption that this is the case, and such a state of facts would not confer jurisdiction upon the court, for the necessary diversity of citizenship must exist at the commencement of the action, and the necessary allegations of

citizenship must be distinctly and clearly made by the averments in the pleadings and the question must not be left to be inferred argumentatively therefrom.

Anderson v. Watt, 138 U. S. 694, at 702;
Brown v. Keene, 8 Pet. 112.

Counsel for defendant in error at the time of the hearing of this motion advanced the novel argument that the allegation in the original complaint that the plaintiff in the court below was a citizen of the District of Columbia does not confer jurisdiction upon this court and is the same as though no allegation of citizenship whatever had been made, and that therefore there is no conflict between that allegation and the allegation of citizenship in the amendment to the complaint, and that the allegation in the amendment to the complaint therefore refers back to the time of the commencement of the action.

This proposition cannot be sustained upon its face. Counsel would have us to believe that a citizen of the District of Columbia has no citizenship whatever, and is not a citizen but the Supreme Court has said otherwise.

In the case of Prentiss v. Brennan, 2 Blatchford (U. S.) 162, 19 Fed. Cases No. 11,385, the court says:

> "A person may be a citizen of the United States and not a citizen of any particular state. This is the condition of citizens residing in the District of Columbia and in the territories of the United States, or who have taken up a residence abroad, and others which might be mentioned. A fixed and permanent residence or domicile in a state is

essential to the character of citizenship that will bring the case within the jurisdiction of the federal courts, as will appear from the cases already referred to."

In conclusion we contend:

First: That the court did not have jurisdiction of the parties or the subject matter, and therefore the order of arrest was void.

Second: That the statute has not been complied with and hence the motion to vacate the order of arrest should have been granted.

Third: That the affidavits upon which such an order can be made, under the laws of California, made upon information and belief, were not sufficient to bring the case under section 479 of the Code of Civil Procedure, or any subdivision thereof, and that the arrest of the plaintiffs in error was unlawful and the motion to vacate such order should have been granted.

It appears to us where the personal liberty of parties is at stake that it is not requiring too much of a plaintiff that he conform strictly with the provisions of the statute and that the affidavit upon which such liberty of a defendant is taken away should state facts and not conclusions of law and hearsay evidence, as has been said in many cases of this character.

We respectfully submit that the order denying plaintiffs in error's motion to vacate the order of arrest should be reversed.

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